In the

United States Court of Appeals

FOR THE THIRD CIRCUIT

Docket No. 05-4997

UNITED STATES OF AMERICA,

Appellant,

-against-

WILLIAM TOMKO,

Appellee,

Brief of Amici Curiae National Association of Criminal Defense Lawyers and Federal Public and Community Defenders of the Third Circuit in Support of Appellee on Rehearing En Banc

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STATEMENT OF THE ISSUES

1. Where the Sentencing Commission disregarded Congressional directives that probation be treated as a distinct form of penal sanction and failed to provide judges with the guidance necessary to make a determination as to whether imprisonment is "necessary" or probation "sufficient" in a given case, is a sentencing judge free to disagree with the suggestions of the sentencing table that a prison sentence be imposed, and to vary from the Guidelines range to impose a sentence of probation with home confinement, in light of a careful consideration of the purposes of sentencing as they apply to the particular offender and offense?

2. Where the Sentencing Commission excluded from its "empirical study" of past practices the "roughly half" of all tax evasion cases that had resulted in sentences of probation, is a sentencing judge free to disagree with the suggestions of the sentencing table, and conclude for a given offender and offense that imprisonment would be "greater than necessary" punishment and therefore impose a sentence of probation with home confinement?

SUMMARY OF THE ARGUMENT

Congress viewed probation as a distinct type of criminal punishment with independent value in the overall sentencing scheme, not a gift of "leniency" to be bestowed only in extraordinary cases. Through the Sentencing Reform Act ("SRA"), Congress directed the Sentencing Commission to implement that view by designing guidelines that would insure that probationary sentences would be the "general(ly) appropriate" sentence in certain defined categories of cases. 28 U.S.C. § 994(j).

The Commission, however, totally failed to comply with these congressional mandates. Instead, the Commission designed a guidelines structure that overwhelmingly favored the imposition of prison sentences and provided no mechanism to guide sentencing courts in their consideration of probationary sentences. This failure to provide guidelines for the imposition of probation occurred even in cases involving first-time offenders and non-violent offenses, and even when supervision with conditions likely would produce sufficient punishment and deterrence.

This defect in the Guidelines structure affects the Sentencing Table, which does not even have a category for "probation." Compounding this basic error, the Sentencing Table (1) provides no guideline range where probation is the only

recommended sanction, (2) permits straight probation for a first offender only at levels 1-8, (3) permits probation with confinement conditions, such as home detention, only up to level 10, (4) requires at least half of the minimum of the guideline range to be served in prison at levels 11 and 12, and (5) allows only for incarceration at levels 13-43 months.

The Guidelines' incorrect treatment of probation also flows from the Commission's flawed use of empirical data in its original analysis of past sentencing practices: in estimating "average" sentences under past practice, the Commission examined only cases that resulted in imprisonment, thus disregarding roughly 48% of all sentences imposed during the relevant time period. Because the Commission excluded probation sentences from its "empirical research," its base line data was incorrect, resulting in Guidelines artificially biased toward harsher sentences -- especially in white collar and tax cases, such as this one. The Guidelines unduly emphasize imprisonment, and probation has been used far less frequently than anticipated by Congress.

Because the tax guideline rests on a flawed analysis of "empirical data and national experience," it "does not exemplify the Commission's exercise of its characteristic institutional role." Accordingly, it is not an abuse of discretion for a district court to conclude that the tax guideline inappropriately yields a sentence

that is greater than necessary, even in a "mine-run case." Kimbrough v. United States, 128 S.Ct. 558, 575 (2007); Gall v. United States, 128 S.Ct. 586, 594 n.2 (2007).

In the wake of United States v. Booker, 543 U.S. 220 (2005), and its progeny, Gall, and Kimbrough, sentencing courts must be encouraged to take a new look at the Guidelines' treatment of probation as a sentencing option and independently determine in individual cases whether probation is statutorily mandated – that is, "minimally sufficient," see United States v. Serafini, 233 F.3d 758, 776 (3d Cir. 2000) – sentence in each individual case. This approach to probation is consistent with the mandate of the SRA, recent pronouncements by the Supreme Court, and social and public policy recognizing the benefits of punishing individuals through alternatives to incarceration.

ARGUMENT

I. The District Court's Sentence Should Be Affirmed Because Probation Is A Punishment Which Congress Contemplated When Enacting The Sentencing Reform Act as More Appropriate in Many Cases, and Which Courts Must Consider and Are Free To Impose.

A. Through the SRA, Congress Announced Its View of Probation As a Distinct Sentence With Independent Value in the Overall Sentencing Scheme, and Directed the Sentencing Commission and Judges to Implement That View In a Broad Range of Cases.

SRA explicitly presents probation as a distinct type of sentence with independent value, not merely a lenient option to be used only in extraordinary cases. Congress directed the Commission to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination *whether* to impose a sentence to probation, a fine, *or* a term of imprisonment." 28 U.S.C. § 994(a)(1)(A) (emphasis added). In those guidelines, the Commission was to "establish a sentencing range that is consistent with all pertinent provisions of title 18." 28 U.S.C. § 994(b)(1). And Congress further directed sentencing judges, "in determining *whether* to impose a term of imprisonment," to "consider the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(a). Thus, Congress intended the courts to first determine *whether* to imprison in light of the characteristics of the defendant, the circumstances of the offense, and all of the purposes of sentencing, considering probation as one of the "kinds of sentences available." 18 U.S.C. §

3553(a)(1), (2), (3). Congress further directed both the Commission and the courts not to use prison for the purpose of rehabilitation if the other purposes of sentencing did not require incarceration. See 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. 98-225 at 119, 176 (1983).

The Commission, however, violated 28 U.S.C. § 994(a)(1)(A) by failing to design a guideline for choosing whether to impose probation or imprisonment. The Commission also violated 28 U.S.C. § 994(b)(1) by failing to provide a mechanism that would guide the decision required by 18 U.S.C. § 3582(a). In these respects, the Commission did not "exercise . . . its characteristic institutional role" as envisioned by the SRA. Kimbrough, 128 S.Ct. at 575. Thus, Judge Lancaster correctly followed 18 U.S.C. § 3582(a), and properly disregarded the guidelines. See Kimbrough, 128 S.Ct. at 570; Gall, 128 S.Ct. at 595-96.

The Supreme Court has admonished sentencing courts to "consider every convicted person as an individual," remaining mindful that a sentence of imprisonment "may work to promote not respect, but derision, of the law, if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." Gall, 128 S.Ct. at 598-99 (citations omitted). Congress anticipated this approach in the SRA, where it expressing an expectation that imprisonment would be inappropriate and that probation would meet the requirements of 18 U.S.C. § 3553(a)(2) for certain

offenders. Specifically, 28 U.S.C. § 994(j) charges the Commission with "insur[ing] that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense[.]"

In the cases described in Section 994(j), then, a probationary sentence is presumptively appropriate. The Commission recognized the need to act on this directive, but has never done so.[1] The Guidelines offer no option that does *not* include a term of imprisonment, and none that reflects the "general appropriateness of imposing a sentence other than imprisonment" in cases that do not involve recidivism, "a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j). The Commission's failure to implement this Congressional directive resulted in a Sentencing Table that completely fails to identify cases where probation, rather than imprisonment, will best achieve the various purposes of sentencing. Indeed, the Sentencing Table provides *no* combination of offense level and criminal history category that excludes the possibility of imprisonment. Every one of the 258 specified ranges, even the range triggered by an offense level of one and a criminal history score of zero, includes imprisonment as an option; by

[1] USSC, *Recidivism and the First Offender* 1-2 (May 2004) (hereinafter "First Offender"), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

contrast, the Sentencing Table *excludes* probation as an option in many cases, including all cases at level 13 and higher.

Thus, the Sentencing Table excludes from a straight probation sentence many offenders, such as Mr. Tomko, for whom a probationary sentence would be sufficient to accomplish the goals of sentencing. See 18 U.S.C. § 3553(a). The authorizing legislation, however, makes it clear that Congress believed that this class of offenders and offenses existed, that such situations were common, not rare, and that probation with appropriate conditions would be a correct and just sentence that would fulfill all the purposes of sentencing in these cases. See infra.

The Commission candidly explained that it designed the Guidelines to constrain sentences within a narrow range based on average time served *in cases in which a sentence of imprisonment was imposed*, a goal nowhere to be found in the SRA:

> By constraining sentences within a fairly narrow range centered about average current practice, such guidelines limit the otherwise broad range of sentences that may be (and currently are) imposed. That is precisely their goal. As a result, there are fewer very lenient sentences (*e.g.*, straight probation), just as there are fewer very harsh ones. Punishment is distributed more evenly.

U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 17 (June 18, 1987) ("Supplementary Report"). Rather than providing courts with a range of prison and non-prison alternatives as

Congress had intended, see infra, the Commission instead dismissed probation as a "very lenient" punishment that rarely would be used.

The Commission's implementation of its preference for imprisonment over probation in the initial set of Guidelines, and its failure ever to expand the availability of non-prison sentences, also failed to follow the direction of Congress that federal sentences "[r]eflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." See 28 U.S.C. § § 991(b)(1)(C), 994(f) (directing the Commission to create and revise the guidelines to reflect such advancements). The legislative history of this provision explicitly recognized "that we do not know very much about how to deter criminal conduct or rehabilitate offenders. . . . Subsection (b)(1)(c) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches." S. REP. 98-225, 161, 1984 U.S.C.C.A.N. 3182, 33344 (1983).

The most noticeable changes in sentencing patterns since the advent of the Guidelines are the drastic decrease in the use of probation sentences and increase in the length of imprisonment sentences. See Frank O. Bowman III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1350 (2005). The percentage of federal defendants sentenced to a purely

probationary sentence declined from approximately 48% in 1984 to 6.2% in 2007.[2] Meanwhile, the length of prison sentences has nearly tripled. Bowman, 105 Colum. L. Rev. 1315, 1328, 1350 n. 65.

That is not what was intended by the Congress that enacted the SRA. The text of the SRA, as well as its legislative history, see infra, demonstrate that Congress instead intended that the use of imprisonment not substantially increase, see 28 U.S.C. § 994(g) ("The sentencing guidelines ... shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons ..."), and that probation constitute its own sentencing option. Further, Congress expressed its intent through the SRA that probation continue to be used with substantially the same degree of frequency as before the Guidelines, although augmented by a panoply of new conditions that would enhance its punitive and deterrent value. The Commission, however, failed to comply with its statutory duty to update the Guidelines in light of the disconnect between this initial intent and actual sentencing trends since the Guidelines were implemented.

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[2] U.S. Sentencing Commission, 2 The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 376 fig. 14 (1991); U.S. Sentencing Commission, 2007 Sourcebook to Federal Sentencing Statistics 27 Fig. D. (2007), available at http://www.ussc.gov/ANNRPT/2007/Table 16.pdf.

This unfortunate failure to implement the statutory goals has created a large and expensive increase in the federal prison population and dangerously overcrowded prisons. The federal prison population is four and half times what it was when the Guidelines became law,[3] it has increased at at least three times the rate of increase of state prisoners since 1995,[4] and it costs the taxpayers over $5 billion per year.[5] As of year-end 2006, the Bureau of Prisons was 37% over capacity.[6] Yet there is no evidence that this explosion of imprisonment serves to achieve the social purposes of the criminal justice system, as defined by law.

As early as November 1996, the Commission staff authored a paper entitled *Sentencing Options under the Guidelines* ("Paper"), which acknowledged that the Guidelines were leading to over-incarceration and exacerbating the risk of recidivism. The Paper admitted that the Guidelines were producing too many

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[3] The federal prison population was 44,408 in 1986, 48,300 in 1987. See Katherine M. Jamieson and Timothy Flanagan, eds., Sourcebook of Criminal Justice Statistics – 1988, tbl. 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989. It currently is approximately 201,214. See http://www.bop.gov/news/quick.jsp#1.

[4] Sentencing Project, The Federal Prison Population: A Statistical Analysis, available at http://www.sentencingproject.org/Admin/Documents /publications/inc_federalprisonpop.pdf.

[5] Costs of Incarceration and Supervised Release ($24,922 per inmate in FY 2007), available at http://www.uscourts.gov/newsroom/2008/costs.cfm.

[6] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2006 at 5, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf.

prison sentences and compiled ten years of data that demonstrate the marked increases in prison sentences (and decreases in other types of sanctions) that followed adoption of the Guidelines. See id. at Appendix A. It also analyzed which offenders received, and which offenses resulted in, non-prison sentences. See U.S. Sentencing Commission, Staff Discussion Paper, Sentencing Options under the Guidelines (Nov. 1996), available at http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf. As the Paper acknowledged, however, non-prison sentences are associated with less recidivism than prison sentences:

> The violation rates for federal offenders placed on simple probation or home confinement have historically been low, particularly violations for commission of new crimes. In recent years, about 15 percent of persons placed on probation were found to violate the conditions of their probation over the course of their supervision. Most of these were for technical violations, such as a positive drug test. About 2.7 percent of probationers were charged with a new offense or absconded while under supervision.
>
> Supervision authorities note that the violation rates for persons under supervised release following a term of imprisonment are generally higher than for persons on probation. In 1995, 36.1 percent of supervised releasees violated the conditions of their supervision; 9.1 percent faced new charges or absconded. Thus, from a crime control perspective, intensive supervision resources perhaps are better spent on the higher-risk supervised releasees than on relatively low risk probationers.

Id. at 18.

The Paper then discusses the conundrum that "[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release." Id. The "best candidates" for crime-free futures are those who have little criminal history, a good recent employment record, are presently employed or attending school, have no history of drug abuse, have no present drug use, and have a stable living arrangement with a spouse. Id. The Commission arrived at precisely the same findings again in 2004,[7] and 2005.[8] Yet the Guidelines continue to label such factors "not ordinarily relevant" when deciding whether an offender needs to be incarcerated, and for how long.

Moreover, as the Commission staff recognized in 1996, "alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties." Other research has shown the negative effects of over-incarceration. See e.g., Miles D. Harar, Do Guideline Sentences for Low-Risk Drug Traffickers

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[7] U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (May 2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf; U.S. Sentencing Commission, Recidivism and the First Offender (May 2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

[8] U.S. Sentencing Commission, A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (Jan. 4, 2005), available at http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

Achieve Their Stated Purposes?, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994) (Bureau of Prisons research in 1994 concludes that for the 62.3% of federal drug trafficking prisoners who were in Criminal History Category I, guideline sentences were costly to taxpayers, had little if any incapacitation or deterrent value, and were likely to negatively impact recidivism); Sentencing Project, Incarceration and Crime: A Complex Relationship 7-8 (2005) ("The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.").[9] Nonetheless, the Commission has not amended the Guidelines to permit more alternative sentences.

The Commission has ignored feedback from judges, contrary to the SRA. See 28 U.S.C. § 994(o). As the fifteenth anniversary of the Guidelines' enactment approached, the Commission conducted a survey of federal circuit and district court judges. See U.S. Sentencing Commission, Summary Report: U.S. Sentencing Commission's Survey of Article III Judges (Dec. 2002). The judges were asked, among other things, to "identify where you believe that changes in the availability of guideline *sentence types* would better promote the purposes of

[9] Available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

sentencing." See id., App. B-7 (emphasis in original). Of the responding district court judges, 38.2% said they believed that straight probationary sentences and 46.1% said probation with confinement conditions should be "more available" in fraud cases. Id.

Despite these "advancements" in the Commission's understanding of the failures of incarceration and the benefits of non-prison alternatives, the Commission has not amended the guidelines to reflect that understanding. In fiscal year 1997, for example, prison sentences accounted for 77.2% of the sentences imposed. That figure has increased nearly every year since then, reaching 86.6% in fiscal year 2007. The percentage of straight probationary sentences, meanwhile, has steadily decreased, from 33% in 1984 to 6.2% in 2007. See Staff Discussion Paper at 10.

B. Consistent With the Statutory Text, the Legislative History of the SRA Reveals the Intent of Congress that Probation Should Play A Significant Role in Sentencing.

The authoritative legislative history of the SRA, Senate Report No. 98-225, (the "Senate Report") issued by the Senate Judiciary Committee ("the Committee"), is replete with examples of the intended and appropriate use of probation as a sentencing option in the federal criminal justice system. These examples, and the Report's recognition of probation as a necessary component of a

fair and transparent sentencing scheme, were misunderstood or ignored by the Commission.

The Senate Report lays out the five specific goals of the new sentencing regime. One was to "assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case." S. Rep. 98-225, at 39, 1984 U.S.C.C.A.N. 3182, 3222 (1983). The Report describes the pre-Guidelines system as "not particularly flexible in providing ... a range of options from which to fashion an appropriate sentence." Id. at 50, 3233. One result of this inflexibility was "that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available." Id. The Senate Report specifically noted certain "better alternatives" to imprisonment: larger fines that would "provide punishment and deterrence to major offenders ... (by stripping them) ... of the "amount ... gained by committing the offense", community service, "interval" imprisonment, served on "evenings or weekends", and more varied conditions as part of a probation sentence.

The SRA expresses Congress's goal of providing district courts with a full range of sentencing options and commends this goal to the attention of the sentencing judge in each case via 18 U.S.C. § 3553(a)(3). Subsection (a)(3) was added to address two concerns, both relevant here. First, Congress did not want sentences of imprisonment to be imposed "where equally effective sentences

involving less restraint on liberty would serve the purposes of sentencing." S. REP. 98-225, 77, 1984 U.S.C.C.A.N. 3182, 3260 (1983). Second, Congress noted that "some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses." Id. For white collar offenders, Congress suggested that the Guidelines provide an option to "fashion a sentence that requires a high fine and weekends in prison for several months instead of a longer period of incarceration." Id. In a "major white collar offense, the judge might impose a sentence to a term of imprisonment and a fine proportionate to the gain to the offender." Id.

The SRA was not intended to embody a presumption of incarceration. See id. at 91, 3274 ("[T]he best course is to provide no presumption either for or against probation as opposed to imprisonment."); Id. at 114, 3297 ("[T]he bill avoids the highly emotional past debate over whether or not there should be a general sentencing presumption either in favor of incarceration or in favor of probation."). Instead, Congress intended to create a system in which options could be creatively combined to meet all of the purposes of sentencing implicated in the case. See id. at 107, 3290 (fines can provide a "clear form of punishment and deterrence."); id. at 55, 3238 (rejecting the assumption that "a term of imprisonment ... is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine").

Mr. Tomko's sentence fits well within the range of Congress's suggestions regarding the possible blend of sentencing options. Although the sentence does not impose imprisonment, it includes a lengthy period of home detention and a substantial fine, well above the maximum recommended guideline range. That lengthy sentence of home detention constitutes a significant and "equally effective sentence[] involving less restraint on liberty," as contemplated by Congress; indeed, even under a mandatory, pre-Booker Guideline regime, the district court could have crafted an identical sentence by merely implementing a three-level departure to level 10. See U.S.S.G. § 5C1.1(c)(3) (Zone B).

Indeed, the Supreme Court in Gall in effect has echoed Congress's recognition that probation constitutes a meaningful sentencing tool, worthy of substantial consideration, within the panoply of sentencing options. Gall disapproved the Eighth Circuit's characterization of Gall's probationary sentence as a 100% downward variance, in part because that characterization failed to recognize the "substantial restriction" of liberty involved in even standard conditions of probation. 128 S.Ct. at 595-96 & n.4 (noting in part that "[p]robation is not granted out of a spirit of leniency[.]"). Although some courts of appeals had reversed probationary sentences when the Guideline range was outside Zone A by relying on § 3553(a)(4) ("kinds of sentence . . established [by] the guidelines"), the Gall Court rejected the Eighth Circuit's conclusion that probation "lies outside the

range of choice dictated by the facts of this case" because "§ 3553(a)(3) ['kinds of sentences available'] directs the judge to consider sentences other than imprisonment." Id. at 602 & n.11. Thus Gall not only tracks the intent of Congress to recognize the value of a probationary sentence, as expressed through the SRA and § 3553(a), but also highlights the reasonableness of the district court's discretionary decision in this case to reject the Commission's over-emphasis on incarceration, to the detriment of all other options.

Further, the intellectual cornerstone of the SRA is the statement of four principal purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3553(a)(2). Congress also specifically noted that, because incarceration is not rehabilitative, a reasonable likelihood of rehabilitation should lead a court to impose a sentence of probation, if the other purposes of sentencing do not require imprisonment. S. REP. 98-225, 122, 173; 1984 U.S.C.C.A.N. 3182, 3305, 3356 (1983). The Commission, however, failed to follow the direction of Congress to consider rehabilitation along with the other three purposes of sentencing. That error contributed to the Commission's failure to generate a guidelines range that recommends only probation or at least a wider range of options that permit probation. This misunderstanding is evident in the Commission's recent report assessing fifteen years of the Guidelines:

> The SRA directs judges to consider each defendant's need for educational and treatment services when

> imposing sentence. However, the SRA and the guidelines make rehabilitation a lower priority than other sentencing goals . . . The Commission was directed to ensure that "the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 994(k). Despite the relatively low priority given rehabilitation, judges are still required to assess a defendant's need for treatment or training when they decide whether to impose any special conditions of probation or supervised release. *See* USSG § 5D1.3(d).

U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, 13 (2004) ("Fifteen Year Report").[10]

The Commission's interpretation of § 994(k) is incorrect. Congress did not say that imposing a "sentence" for rehabilitative purposes is inappropriate; it said that a "sentence *to a term of imprisonment*" is not rehabilitative. Indeed, for this very reason, Congress provided that imprisonment is not appropriately imposed solely to foster rehabilitation. See S. REP. 98-225, 71, 1984 U.S.C.C.A.N. 3182, 3254, n. 531 (1983). ("[I]f an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation . . . [A] defendant should not be sent to prison only because the prison has a program that 'might be good for him.'"). The Commission's belief that Congress placed a "low[] priority" on rehabilitation is not

[10] Available at http://www.ussc.gov/15_year/15year.htm.

supported by the statute or its legislative history. See Marc L. Miller, Purposes of Sentencing, 66 S. Cal. L. Rev. 413, 436 (1992) ("It is not surprising that judges and other participants in the guideline system rarely confront the role of rehabilitation in shaping guideline sentences when one considers that rehabilitation is statutorily precluded as a justification for imprisonment [and] all offenders under the current guidelines receive presumptive sentences that include prison time.").

C. Based Upon its Misunderstandings, the Commission Articulated Flawed Commentary and Policy Which Should Not Trump All Other Sentencing Considerations Upon Which District Courts May Rely.

The Commission's misinterpretation of the statutes and the legislative history led it to incorrectly conclude that rehabilitation was a less important purpose of sentencing. That incorrect conclusion was compounded by a second misapprehension: that Congress in the SRA expressed a preference for more incarceration in all white collar cases. These incorrect conclusions created a third: that Congress generally disfavored probation, especially in all white collar cases, and that probation never could serve the purportedly more important purposes of just deserts and deterrence.

That snowball effect is evident in this case. The commentary to the applicable guideline states that "[u]nder pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of

twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length." U.S.S.G. § 2T1.1, comment. (backg'd.). But the increase in sentence ranges, requiring incarceration in most cases, contradicts Congress's direction that first offenders convicted of non-violent offenses are not appropriate candidates for imprisonment. 28 U.S.C. § 994(j). As the Senate Report said:

> The placing on probation of ... a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact.
>
> This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose. This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service; he cannot simply be released on probation with no meaningful sanction.
>
> Similarly, the Committee expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions.

S. Rep. 98-225, 92, 1984 U.S.C.C.A.N. 3182, 3274-75 (1983).

The Commission erred in creating tax guidelines that favored imprisonment over probation, and that focused on deterrence and retribution while virtually ignoring rehabilitation. The Supreme Court has authorized sentencing judges to consider arguments that the applicable guidelines fail properly to reflect § 3553(a) considerations, as the court did in this case. Rita, 127 S.Ct. at 2465, 2468. As Justice Stevens recognized in his concurrence, "many individual characteristics . . . are not ordinarily considered under the Guidelines," but are nevertheless "matters that § 3553(a) authorizes the sentencing judge to consider." Id. at 2473 (Stevens, J., concurring). Although courts must consider the guidelines as one of the § 3553(a) factors, they cannot blindly defer to policy decisions of the Sentencing Commission. Rita, 127 S.Ct. at 2463, 2465, 2468; Gall, 128 S.Ct. at 586, 594–95. Based on the facts of an individual case, judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," Kimbrough, 128 S.Ct. 558, 570 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." Rita, 127 S.Ct. at 2463.

The Commission's misunderstandings of the value of probation and the sentencing goals of Congress produced this statement in the Guidelines:

> The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of

> violence or an otherwise serious offense . . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."
>
> The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

U.S.S.G., Ch. 1, Pt. A, Subpt. 1 (1987). Thus the Commission promulgated an extraordinarily broad and inflexible definition of "serious" offenses ineligible for probation. That definitional shift swallowed an entire statutory regime and virtually precluded meaningful consideration of the reasons for probation that the SRA requires courts to consider.

The Commission failed to define *any* class of offenders for whom probation met all of the purposes of sentencing, and for whom imprisonment should be the exception, not the norm. Despite Congress's authorization of probation for a broad range of offenses and offenders, no guideline advises the court how to reach a "probation only" range. Congress authorized probation even for "serious" crimes below Class B, i.e., for any offense with a statutory maximum below 25 years. See

18 U.S.C. § 3561(a)(1) (citing 18 U.S.C. § 3559(a)). Given how high the statutory eligibility for probation reaches, it was patently unreasonable to devise a guideline chart that treats probation as appropriate only in the most trivial or mitigated cases.

After Booker and Kimbrough, the Commission's mistake can be corrected in an individual case. Sentencing judges may consider arguments that the applicable guidelines fail properly to reflect § 3553(a) considerations, reflect an unsound judgment, do not treat defendant characteristics in the proper way, or result in an inappropriate sentence. Rita, 127 S.Ct. at 2465, 2468. District judges and courts of appeals are appropriately embracing this invitation. See United States v. Tankersley, __ F.3d __, 2008 WL 3307135 (9th Cir. Aug. 12, 2008) (Kimbrough analysis applicable to all guidelines); United States v. Jones, 531 F.3d 163 (2d Cir. 2008) (same); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008) (fast track and all guidelines); United States v. Martin, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); United States v. Smart, 518 F.3d. 800, 808-09 (10th Cir. 2008) (Kimbrough analysis applicable to all guidelines); United States v. Sanchez, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); United States v. Marshall, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008) (career offender); United States v. Barsumyan, 517 F.3d 1154, 1158-59 (9th Cir. 2008) (Kimbrough analysis applicable to all guidelines); United States v. Moreland, slip op., 2008 WL 904652

(S.D. W. Va. Apr. 3, 2008) (career offender); United States v. Malone, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); United States v Baird, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); United States v. Cabrera, __ F.Supp.2d __, 2008 WL 2879675 (D. Mass., July 25, 2008) (over-emphasis on drug quantity, under-emphasis on minimal role); United States v. Grant, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008) (second degree murder guideline); United States v. Shipley, __F. Supp. 2d __, 2008 WL 2470001 (S.D. Iowa June 19, 2008) (child pornography); United States v. Hanson, __ F.Supp.2d __, 2008 WL 2486336 (E. D. Wis. June 20, 2008) (child pornography); United States v. Rausch, __ F. Supp. 2d __, 2008 WL 3411819 (D. Colo. Aug. 13, 2008) (child pornography). Further, a reasoned judicial determination that a particular guideline reflects unsound judgment in light of § 3553(a) considerations does not only result in a more just and effective sentence in the individual case; it provides feedback to the Sentencing Commission a core function in the constructive evolution of responsible guidelines. See Rita, 127 S.Ct. at 2464, 2465, 2468-69; Kimbrough, 128 S.Ct. at 573-74; United States v. Jones, 531 F.3d 163, 174 n.8 (2d Cir. 2008).

In this case, the district court fashioned a sentence for a non-violent, first offender exactly as Congress intended: by creatively combining rehabilitation with deterrence and punishment, and recognizing that there was no need for

incapacitation. The district court properly concluded that the Sentencing Table's line between probation and imprisonment, at least as applied to this case, does not reflect a proper balancing of the four principal purposes of sentencing, as articulated by Congress. Because the sentence that Judge Lancaster selected is sufficient to fulfill all the purposes of sentencing, it should be affirmed.

II. The District Court's Variance From The Guidelines Should Be Affirmed Because The Tax Guideline Fails To Reflect Past Sentencing Practices, Including a Significant Proportion Of Probation Sentences.

Kimbrough authorizes a sentencing court to fashion a discretionary sentence based on the specific circumstances of the case where the Guidelines sentence would violate the overarching statutory instruction in § 3553(a) to "impose a sentence sufficient, but not greater than necessary." The Commission's institutional role in formulating the Guidelines has two basic components: (1) reliance on empirical evidence of pre-Guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and experts in the field. Rita, 127 S.Ct. at 2464-65. Where the Commission has failed to fulfill those requirements, a reasoned decision to diverge from the guideline range will not be an abuse of discretion. See Kimbrough, 128 S.Ct. at 575. See Kimbrough, 128 S.Ct. at 570 (judges "may vary [from Guidelines ranges] based solely on policy considerations"); id. at 576 ("District

Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the . . . position that the crack/powder disparity is at odds with § 3553(a).").

Guideline ranges involving regulatory offenses, fraud, and other non-violent crimes are particularly vulnerable to scrutiny under Kimbrough and Rita. When the Commission considered past practices in order to set sentencing levels for such offenses, it surveyed sentences of incarceration but inappropriately omitted consideration of cases that resulted in probation. Thus the sentencing court here reasonably concluded that the recommended guideline sentence of 12-18 months' imprisonment was not based on empirical data and national experience, and therefore was greater than necessary to satisfy the purposes of sentencing. See Kimbrough, 128 S.Ct. at 575.

A. The Guideline Ranges Reflect The Sentencing Commission's Review And Averaging Of Past Imprisonment Sentences, Not a Careful Calibration Of The Statutory Sentencing Purposes.

Congress expected the Commission to consider all four statutory purposes of sentencing in developing the Guidelines.[11] The original Commissioners, however, "considered" only "just deserts" and "crime control," and then abandoned those

[11] See 28 U.S.C. § 991(b)(1)(A); S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984).

two purposes when they could not agree on which should predominate.[12] The Commission sought to solve its "philosophical dilemma" by adopting an "empirical approach that uses data estimating the existing sentencing system as a starting point," but ultimately did not follow that approach either. Rather, the Commission implemented sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," especially white collar offenses and drug trafficking offenses.[13]

In response to complaints that the original guidelines for white collar offenses, including the way in which they "modified pre-existing probation practices," were "too harsh," then- Judge and Commissioner Breyer remarked that "once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad," and opined that the "resulting compromises do not seem too terribly severe."[14] In any event, the system was "evolutionary" and was to be improved based on information from actual practice under the Guidelines.[15]

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[12] U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

[13] Fifteen Year Report at 47, citing Supplementary Report.

[14] Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 21-23 (1988).

[15] Id. at 18.

The development of the tax guidelines, Chapter 2T, demonstrates how the Commission's selective use of data resulted in ranges that diverged dramatically from past practice. Table 1(a) of the Supplementary Report compiles average past sentences for first-time offenders convicted at trial of various offenses. The Supplementary Report explains that the "'sentence level' is the offense level that is closest to the average time currently served by first-time offenders *who are sentenced to a term of imprisonment.*" Supplementary Report 23 (emphasis added). Thus an average pre-Guidelines sentence of approximately 18 months would translate to a sentence level of 14 (15-21 months). Id.

The comparison is misleading, however, because the pre-Guidelines "averages" were based only on cases involving terms of imprisonment. For example, the past practice sentence level for an unsophisticated embezzlement of less than $1,500 was calculated as 8, reflecting an average length of a sentence of incarceration of about 5 months and a range of 2-8 months. Supplementary Report 24. The Commission, however, excluded from consideration all non-prison sentences, which accounted for about *76%* of embezzlement cases. He Commission acknowledged that, when these non-prison sentences were included, "the average time served by all first-time embezzlers convicted at trial of stealing $1,500 is actually about 1 month (rather than 2-8 months)." Id.

The tax guideline is similarly skewed. Only 30% of first-time offenders convicted after trial in tax cases involving loss of $5,000 or less were sentenced to prison. The Commission's estimate of "average" time served – equivalent to a level 9 (4-10 months), a range with a midpoint of 7 months – was based only on this subset of 30% of offenders. Supplementary Report, Table 1(a) at 34. Inclusion of the vast majority of such offenders who did not receive sentences of incarceration would have reduced the average sentence length to a little over two months.[16]

The effect of excluding probationary sentences remains significant even at the higher level of loss involved in Mr. Tomko's case. According to Table 1(a), 78% of offenders responsible for loss between $100,000 and $400,000 received prison sentences; 22% did not. See id. Table 1(a) indicates a sentence level of 12 for a first-time offender convicted of an income tax offense involving a loss between $100,000 and $400,000. See id. The resulting range of 10 to 16 months (presumably indicating an average of approximately 13 months) excludes the 22% of offenders who were not sentenced to prison. Moreover, all of the data excluded by the Commission fell at one end of the sentencing spectrum: probation. The

[16] If 30% of all first offenders convicted of tax fraud involving $5000 or less served an average term of 7 months, then 100% of all first offenders convicted of tax fraud involving $5000 or less served an average term of 2.1 months (30 multiplied by 7 divided by 100).

Commission did not, for example, systematically exclude as outliers sentences that were unduly harsh.

As a result, the Guidelines deviated from past sentencing practice. Under the pre-Booker mandatory Guideline regime, *every* defendant with a range of 10-16 months had to serve at least half of that term in prison. The survey of past practices, however, revealed that nearly a quarter of similarly-situated defendants never received prison terms. If the Commission had included the 22% non-prison sentences, the average past sentence length would have been about 10 months,[17] the equivalent of level 10. That level, within Zone B, would allow a sentence of probation with a condition of home detention.

In addition, the Commission failed to consider its own data regarding the mitigating factors that had informed past practices. For example, sentences for income tax offenders who pleaded guilty were decreased by an average of the equivalent of 4 levels. Supplementary Report 24 & Table 1(b) at 38. The average pre-Guidelines sentence for a defendant like Mr. Tomko, then, would equate to a sentence level of 8 rather than 12 (not including the 22% probationary sentences), or 6 rather than 10 (including the 22% probationary sentences). Under the initial

[17] If 78% of all first offenders served an average term of 13 months and the remaining 22% served 0 months, then all first offenders convicted of tax fraud involving between $100,000 and $400,000 served an average term of 10 months (78 multiplied by 13 divided by 100).

version of the guidelines, an offense level of 8 would have triggered a range of 2-8 months, within Zone A, allowing straight probation. See Guidelines Manual, Ch. 5 pt. A (Oct. 1987). That approach would have represented a far more accurate reflection of past practices. The initial version of the Guidelines, however, set an offense level of 13 for the tax loss at issue in Mr. Tomko's case. U.S.S.G. § 2T4.1 (Oct. 1987). With the then-applicable two-level downward adjustment for acceptance of responsibility, the final offense level would have been 11, producing a range of 8-14 months, in Zone C, requiring imprisonment.

Ultimately, because the tax guideline rests on a flawed selection of "empirical data and national experience," it "does not exemplify the Commission's exercise of its characteristic institutional role." Accordingly, it is not an abuse of discretion for a sentencing court to conclude, based upon a reasoned evaluation of individual circumstances, that the Guidelines relevant to white collar offenses in general, and to tax offenses in particular, yield a sentence that is greater than necessary even in a "mine-run case." Kimbrough, 128 S.Ct. at 575; Gall, 128 S.Ct. at 594 n.2. Here, the district court's exercise of discretion rested upon a meaningful consideration of the § 3553(a) factors and the particular facts of Mr. Tomko and his offense. It should be upheld.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed.

Dated: October 1, 2008

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, Lawrence S. Lustberg, hereby certify that, on October 1, 2008, I caused the Brief of Amici Curiae National Association of Criminal Defense Lawyers and Federal Public and Community Defenders of the Third Circuit in Support of Appellee on Rehearing En Banc (two copies) to be served by first-class mail, postage prepaid and e-mail upon:

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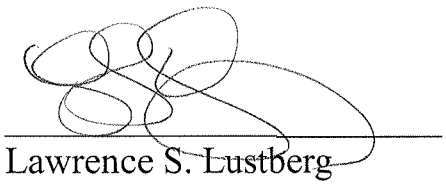
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Newark, New Jersey
October 1, 2008



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CERTIFICATION OF BAR MEMBERSHIP, COMPLIANCE WITH FED. R. APP. P. 32(A) AND IDENTICAL COPIES

I certify, pursuant to L.A.R. 28.3(D), that I am a member of the bar of this Court.

I further certify that this Brief complies with the typeface, type style and type-volume requirements of Fed. R. App. P. 32(a)(5), (6) and (7). It was prepared in Times New Roman 14 point, a proportionally spaced typeface, using the Microsoft Word 2002 word processing program. According to the word count feature of Microsoft Word 2002, it contains 7494 words, excluding those parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The text of the electronic version of this brief filed with the Court is identical to that of the paper copies filed herewith. A virus detection program (Symantec Antivirus/Filtering for Microsoft Exchange 2000 version 3.05 or higher) has been run on the electronic version, and no virus was detected.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

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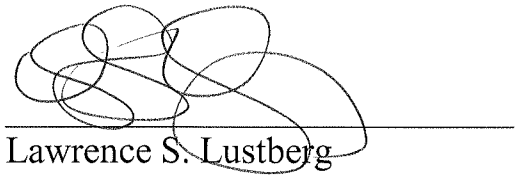

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